United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-2370

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IN THE UNITED STATES

COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD and GEMMA BRAULT
(Plaintiffs-Appellants)

P/S

v.

TOWN OF MILTON
(Defendant-Appellee)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT

BRIEF OF APPELLEE

Matthew I. Katz, Esquire
Latham, Eastman, Schweyer & Tetzlaff
P. O. Box 568
Burlington, Vermont 05401
Attorney for Appellee

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STATEMENT OF CASE

Responding to the then nascent pressures of haphazard, unplanned development in a rural Vermont town, the Town of Milton passed its first zoning ordinance in the mid-sixties.

Gerard and Gemma Brault (hereinafter called "Appellants") sought to operate a trailer park in the Town but were enjoined from doing so by a state court in 1967 because their development failed to conform to the ordinance. The injunction was eventually vacated when the zoning ordinance was declared invalid because of procedural defects in its adoption. Town of Milton v. Brault, 129 Vt. 431, 282 A. 2d 861 (1971). Appellants sought damages based on the wrongful issuance of the injunction. Such damages were denied on the basis of the Town's immunity under the law of Vermont. Town of Milton v. Brault, 132 Vt. 377, 320 A.2d 620 (June 12, 1974).

Appellants then instituted a civil rights action in the District Court, seeking again the same damages caused by the wrongful issuance of the state court injunction. The Town moved to dismiss on grounds of res judicata and failure to state a claim upon which relief can be granted. As required by local rule, the Town accompanied its motion with a memorandum. Appellants failed to timely respond with their own memorandum. The District

Court, Coffrin, J., dismissed the action. Appellants timely appealed.

STATEMENT OF ISSUES

Did the trial court commit reversible error in dismissing the complaint because "the defendant is not a person within the meaning of 42 V.S.C. §1983 and the action may not be maintained for that reason?"

1. Does the complaint state a cause of action under 42 U.S.C. §§1983, 1985 or 1986?
2. Does the complaint state a cause of action independent of §1983?
3. Did the trial court commit error, as appellants suggest in deciding the case without a hearing on the amount of controversy?
4. Have appellants waived the issue now urged upon the Court of Appeals by failing to present it to the trial court?

ARGUMENT

1. THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. §§1983, 1985 or 1986.

The complaint under scrutiny in this appeal is clearly one denominated as brought pursuant to 42 U.S.C. §1983. This section of the civil rights statutes is mentioned in paragraphs 1 and 9 of the complaint. Appendix 2-3, and is the only cause of action referred to. That municipalities are not "persons" within the meaning of the act is beyond dispute. Monroe v. Pape, 365 U.S. 167, 191 (1961); City of Kenosha v. Bruno, 412 U.S. 507, 518 (1973).

Appellants urge, however, that because their claim is one wherein the matter in controversy exceeds the sum of $10,000 the trial court has jurisdiction under 28 U.S.C. §1331 (a). This argument confuses the difference between jurisdiction and cause of action or right enforceable by the courts.[1] The difference between jurisdiction and cause of action has been clearly delineated by the Supreme Court in Bell v. Hood, 327 U.S. 678 (1946). In Bell, the plaintiffs complained against F.B.I. agents, founding their claims on the Fourth and Fifth Amendments. The Court, through Justice Black, held that the District Court had jurisdiction to determine if plaintiffs had a cause of action, while

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[1] Original Ballet Russe, Ltd. v. Ballet Theatre, Inc. 133 F.2d 187 (2d Cir. 1943).

remanding without deciding the cause of action question. In this case, Judge Coffrin's decision is clearly one on the merits, not a dismissal for lack of jurisdiction. As such, it should be sustained, for the complaint is clearly brought under §1983 and does not lie thereunder.

Appellant also alleges a cause of action under 42 U.S.C. §1985-86 in their brief on appeal.[2] This court has held that an action against a municipality will not lie under §§1985 or 1986. Spampinato v. City of New York, 311, F.2d 439, cert. denied 372 U.S. 980 (1962); Spiesel v. City of New York, 239 F. Supp 106 (S.D.N.Y. 1964), aff'd. 342 F.2d 800, cert. denied 382 U.S. 856; see also Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972).

2. THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION INDEPENDENT OF §1983.

To secure relief on a claim at law, a plaintiff must, by definition show that he has a "legal right." Davis v. Romney, 490 F.2d 1360, 1368 (3d Cir. 1974). Thus, one who seeks to secure damages for violation of a statute or a constitutional provision must demonstrate a legislative or constitutional intention that the provision relied upon comprehends awards of damages to one in his place. Id., citing Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971); J.I. Case Co. v. Borak, 377 U.S. 426, 431-33 (1964).

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[2]See Argument at p. 10 infra.

Hence, if Plaintiffs have no remedy against the Town of Milton under §§ 1983, 1985 or 1986 is there an alternate cause of action? Construing the Civil Rights Act of 1866 (18 U.S.C. 241-242), the predecessor of §1983, the Supreme Court has held:

> We hesitate to say that when Congress sought to enforce the Fourteenth Amendment [through the Civil Rights Acts] it did a vain thing. We hesitate to conclude that for 80 [now over 100] years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by the Fourteenth Amendment has been an idle gesture.

Screws v. United States, 325 U.S. 91, 100 (1945).

Plaintiffs would have this court hold that Congress, in deliberately excluding municipalities from the coverage of 1983, acted in vain. Indeed when it has renewed §1983 since 1875 (date of enactment of 28 U.S.C. §1331, general federal question jurisdiction), Plaintiffs would have us believe this too has been in vain, as the entire section is unnecessary—one has a civil cause of action and remedy in damages inherent in the Constitution for every violation of every right secured therein.

Reliance for this startling proposition upon Bivens v. Six Unknown Federal Narcotics Agents, supra, would be misplaced. Sensing that it was about to inspire a new generation of previously unfounded litigation, the Court was unusually careful to clearly state its holding: A violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action

for damages. Id., at 389. A careful reading of Bivens makes clear that its holding was based upon the unique circumstances of that case. The court noted that the mere invocation of federal authority by federal agents left Bivens without means of resisting the alleged violation. Such is not the situation before this court; the Town was just another litigant in state court, and the Braults had every right to resist its demands.

The only other cases in which the Supreme Court recognized a cause of action without statutory basis are similarly inapplicable to this litigation. In Jacobs v. U.S., 290 U.S. 13 (1933), the court held that under the Fifth Amendment a private party had a right of action against the government for just compensation for the taking of his property. However, the very language of the Fifth Amendment, in requiring "just compensation," contemplates the payment of money damages. Additionally, no other remedy was available to Jacobs. In J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the court granted a remedy stemming from a statutory scheme which did not provide for civil liability because such an action was "necessary" to effectuate the purposes of the Act. Id. at 433.

As a prerequisite to creating a constitutionally inherent remedy, the court must first determine that the implicated constitutional provision provides substantive protection to one in the position of plaintiff. The focus

should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought. See, Dellinger, Of Rights and Remedies; The Constitition as a Sword, 85 Harv. L. Rev. 1532, 1555. T he remedy of defending a state court action was clearly available to Appellants. That this process did not result in damages gains Appellants nothing as the Constitution—even as interpreted in Bivens—does not abrogate the immunity of the sovereign to suit. Bivens, supra, at 447 (n.) (Harlan, J., concurring).

Unlike the Fourteenth Amendment, the Fourth and Fifth contain no clause granting to Congress the power to implement their substantive provisions by appropriate legislation. It is therefore fairly to be inferred from the language of the Constitution that remedial legislation is unnecessary to the earlier amendments, while contemplated and therefore necessary to the Fourteenth. Certainly the Reconstruction Congress, which authored both the Amendment and the enforcing legislation, is to be afforded the presumption that is understood the limits of rights and remedies arising out of its own work. Its decision[3] that municipalities not be liable for violations should not be lightly judged as mistaken or in vain.

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[3]The decision in Monroe v. Pape, supra, absolving municipalities of monetary liability under §1983, was based upon legislative history.

In the absence of liability under §1983 courts have searched for alternative sources, but have not found any. See, Moor v. Madigan, 458 F. 2d 1217, 1220 (9th Cir. 1972); Johnson v. New York State Ed. Dept., 319 F. Supp. 271, 276 (E.D.N.Y. 1970). Without specific authority in the language of the Constitution, federal liability can be created only by an affirmative act of Congress. Gonzales v. Doe, 476 F. 2d 680, 685 (2d Cir. 1973). Without such statutory authority, this complaint should be dismissed.

Appellants' reliance upon Bell v. Hood, supra, is misplaced. Bell decided only the jurisdictional question, reserving the question of a substantive cause of action. Bivens, supra at 389.[4] Similarly, reliance upon City of Kenosha v. Bruno, 412 U.S. 507 (1973), gains them nothing. Plaintiffs in Kenosha sought only delcaratory and injunctive relief. Id., at 508. Further, the Attorney General of Wisconsin was allowed to intervene as a party defendant. Id., at 513. Hence the remand in Kenosha stands for anything but the reading ascribed to it by appellants; a reading that apparently states municipalities may be sued for damages by virtue of the Fourteenth Amendment even if they can't be reached under the Amendment's foremost remedial statutes, §1983, 1985. Rather, Kenosha holds that the statute there under attack may be tested for purposes of declaratory and injunctive relief if the

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[4]Justice Black, who authored Bell, dissented in Bivens. The latter in no way "reaffirms" the former.

presence of the Attorney General or a $10,000 matter in issue cure the jurisdictional defect existing from reliance upon 28 U.S.C. §1343 (3). It has long been held that where equitable remedies are sought, there is no requirement that the Plaintiff be invested with a legal right.[5] Davis v. Romney, supra at 1368-69, citing Scripps - Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 14-15 (1942); Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 551-552 (1937).

Appellants here seek only the monetary damages they were denied in state court. As such they must establish the legal claim of right upon which their claim is buttressed. They cite no case supporting the proposition that municipalities may be sued in federal court for damages resulting from alleged infringment of constitutional rights.[6] Without such authority, the decision below should be affirmed and the appeal dismissed.

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[5]Dupree v. Chattanooga, 362 F. Supp. 1136 (1973), relied upon by Appellants, also involved only equitable relief.

[6]Plaintiffs in Moor v. County of Alameda, 411 U.S. 693 (1973) sought to hold in the County as a defendant through the use of diversity jurisdiction and an implied waiver of the 1983 "person" defense because of California's municipal liability statutes. The Supreme Court's extended discussion of these questions would have been unnecessary under Appellants' broad reading of Bivens. If a right to damages resulting from municipal disobedience of the Constitution needs no statutory basis, and the $10,000 necessary for diversity was present, the extended opinion and dissent were unnecessary to the resolution of the case.

3, THE TRIAL COURT COMMITTED NO ERROR IN DECIDING THE CASE WITHOUT A HEARING ON THE AMOUNT IN CONTROVERSY.

Appellants imply in their brief that they, as the Plaintiffs in City of Kenosha v. Bruno, supra, were entitled to a hearing on the amount in controversy. The complaint alleged an amount in controversy exceeding $10,000. The case was decided on a motion to dismiss. Hence all facts well-pleaded were deemed admitted for the purpose of the motion. 2A Moore, Federal Practice, ¶12.08. There was no need for such a hearing.

4. APPELLANTS HAVE WAIVED THE ISSUE THEY NOW BRIEF—A CAUSE OF ACTION ARISING DIRECTLY FROM THE CONSTITUTION—BY FAILING TO PRESENT IT TO THE TRIAL COURT.

The complaint which is the subject of this appeal appears on its face to be drawn pursuant to 42 U.S.C. §1983. The Town moved to dismiss on the ground that it is not a "person" within the meaning of §1983. Pursuant to Local Rule 9 [7] of the District Court, the Town filed a memorandum

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[7] United States District Court for the District of Vermont, Local Rule No. 9, Motions:

All written motions, other than those presented during the course of trial, shall be accompanied by a brief or memorandum of law containing a concise statement of the legal contentions and authorities relied on in support of said motion. A copy of each such motion and memorandum or brief shall be served upon all opposing parties.

Any party desiring to oppose the granting of such motion shall file a brief or memorandum in opposition thereto, not later than ten days after the date of service of such motion and memorandum or brief, unless such time is extended by order of the judge to whom the case is assigned.

In the absence of an opposing memorandum, the motion shall be deemed unopposed and shall be considered without argument.

Oral argument shall be dispensed with unless specifically requested by an interested party or the motion is set for hearing by the court. In any case, the Court may decline to hear oral arguments and may dispose of such motion on the briefs or memoranda and without further hearing or argument.

supporting its motion. Appellants did not respond. The rule provides that it shall be deemed that the motion was unopposed. Appellants have raised their theory of a remedy springing directly from the Constitution for the first time on appeal.

In order to avoid the delay and expense incident to appeals, reversals, and new trials upon grounds which might have been corrected in the trial court if the question had been properly raised therein, the appellate courts have developed and applied the rule that they will normally only consider questions which were raised and reserved in the lower court. McGrath v. Manufacturers Trust Co., 338 U.S. 241 (1949). Corollary to this is a rule that the reviewing court will consider the case only upon the theory upon which it was presented in the court below. Dunn v. U.S., 284 U.S. 390 (1932).

Appellee in the case at bar is meeting Appellants' arguments and theory of recovery for the first time on appeal. Appellee suggests therefore that the appeal be dismissed.

CONCLUSION

The Town of Milton requests the appeal be dismissed for raising only issues which were not raised below. Barring

that, the Town urges affirmance of the District Court's dismissal on the merits on the grounds that Appellants have no cause of action or legally enforceable right against the Town of Milton. The Town is not a proper party defendant under 42 U.S.C. §§ 1983, 1985, 1986. Appellants have no substantive basis for damages for violation of rights under the Constitution apart from these statutes. The trial court should be affirmed in its dismissal for failure to state a claim under §1983.

DATED at Burlington, Vermont this 27th day of December, 1974.

Respectfully submitted,

Matthew I. Katz
Latham, Eastman, Schweyer & Tetzlaff
Attorneys for the Town of Milton

CERTIFICATE OF SERVICE

I, Matthew I. Katz, a member of the firm of Latham, Eastman, Schweyer & Tetzlaff hereby certify that I have served the foregoing brief by mailing the same to John A. Burgess, Esquire, Box 766, Montpelier, Vermont this 31st day of December, 1974.

Matthew I. Katz